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**The quintessentially democratic act?
Democracy, political community and citizenship in and after the UK's EU
referendum of June 2016**

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Abstract

On 23 June 2016, the United Kingdom voted to leave the European Union, by a rather small majority. Although much about the future relations between the EU and the UK remains uncertain, it is already possible to explore in more detail the issues of democracy, political community and citizenship which were thrown up by this referendum result. The article explores the reconstruction of the vote as the 'will of the people', in the light of the principle of democracy which suggests a more nuanced approach to the issue of democratic consent in complex multi-level polities such as the UK and the EU. Specific questions are raised about the narrowness of the referendum franchise, and about the consequences that flow from the territorially differentiated result of the referendum, with Scotland in particular voting strongly 'to remain'.

Keywords

Referendum, Brexit, European Union law, Scotland, franchise, right to vote, democracy, legitimacy

1. Introduction

The starting point for this article is the result of the referendum held on 23 June 2016 concerning the United Kingdom's membership of the European Union. On a turnout of 72.2%, the choice of 'Leave the EU' prevailed over 'Remain in the EU' by a margin of 51.9% to 48.1%.¹ This simple statement conceals much complexity in relation to the debate surrounding, and outcome of, the referendum, especially when analysed in relation to questions of democracy, political community and citizenship.

Despite the enormity of the implications of the vote to leave the EU, at the time of writing little about the future of the UK or the EU or the relations between the two could be stated with certainty. Article 50 TEU, which will lead either to a consensual departure process or – in the absence of agreement – to the UK automatically leaving the EU after two years, was triggered in March 2017. However, the opening of negotiations was delayed by elections in France and the UK. None the less, this is no reason to delay scholars from taking a closer look at the democratic character of the referendum, the debates which have preceded and followed it, and the procedures being adopted to implement the referendum. This opens up many questions for analysis, of which only a tiny portion can be addressed in this article.

¹ The full referendum results are available at <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>.

On the one hand, the referendum seems like the purest expression of a democratic will on the part of the voting population of a European state, which has a long history of democratic culture and has been a Member State of the EU and its predecessor European Communities for more than 40 years, whilst retaining a stubborn Eurosceptic streak within its political culture. On the other hand, any referendum result – however close or decisive – will have been influenced by the design of political community (i.e. the question of who could vote and the manner in which the referendum question and outcome are structured) and by the extent to which issues of (political) membership and belonging (often taking the form of discussions of immigration) have been framed into the referendum process.

The context for this article's discussion of these issues is the dominant post-referendum reconstruction of the Leave vote as a decisive expression of the people's will, which Parliament in turn is obliged to implement (Section 2). This opens the question as to whether and how the ideas about 'demoi-cracy' (Section 3) might assist us in the evaluation of the character of the UK's Brexit process. At the end of this section, I briefly reflect on whether 'demoi-cracy' is not only applicable to the case of the EU (as has been widely argued), but is also a useful tool for thinking about the UK's piecemeal institutional arrangements and differentiated citizenship rights and practices. I then explore the tensions surrounding the Brexit vote and its implementation by examining how concepts of political membership at the EU and UK level have opened and closed opportunities for political participation (Section 4). To do this requires some reflection upon the citizenship regimes which operate under EU and UK law, including the political rights – at different levels – conferred upon the respective groups of citizens.

In future years, once the respective trajectories of the EU and the UK (and its component nations) are clear, historians will probe in detail the circumstances surrounding the vote on the 23 June 2016, and what its implications are for those directly and indirectly affected. Lawyers, in turn, will be deeply involved in assessing all aspects of the process. At this stage, we can develop only a preliminary politico-legal assessment of the process, using both the descriptive and normative resources of the idea of demoi-cracy, or – literally – the rule of the several '*demoi*' whose individual and collective futures were at issue on that date.

2. The post-EU referendum reconstruction of the will of the people

Post-EU referendum political discourse in the UK at the political party level has been dominated by the trope of 'the people have spoken',² so Brexit must be delivered (or at least not opposed, e.g. in Parliament). Commitment to the 'will of the people' as expressed in the referendum vote has exercised a decisive influence not only on the conduct of the governing Conservative Party, but also on the majority of the parliamentary representatives of the main opposition Labour Party. Explicit parliamentary opposition in the House of Commons to giving parliamentary approval to triggering Article 50 TEU was concentrated within the

² This was carried to its furthest extent in Prime Minister Theresa May's invocation of 'The strength and support of 65 million people willing us to make it happen' in her Lancaster House speech of January 2017 on exiting the EU:
<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

Scottish National Party and the numerically inferior (but more influential in England) Liberal Democrats, in addition to individuals within the Conservatives and Labour.³ This was despite the fact that prior to the referendum well over 70% of all members of the House of Commons declared themselves to be backing the Remain campaign.⁴ In the House of Lords, the picture is more nuanced, partly because of its role as a revising chamber that traditionally would not block legislation approved by the House of Commons. Indeed, for the European Union (Notification of Withdrawal) Act 2017, the interventions of the House of Lords were limited to one round of amendments, subsequently reversed by the House of Commons.⁵ Some of the clearest arguments since the referendum warning about the implications of the Brexit vote have come from outside the Westminster Parliament in the form of speeches delivered by two former Prime Ministers,⁶ and of statements from politicians speaking out about the territorially differentiated outcomes of the referendum which saw Scotland, Northern Ireland, London and Gibraltar all deliver majority 'remain' votes.⁷

Political actors speaking out regarding a referendum vote will have particular party, sectional, national or regional interests in mind. But they may also be influenced in what they say by conceptions of democracy. So when a politician responds to a relatively narrow referendum result with the headline statement of 'the people have spoken', this suggests the dominance in her mind of a singular *national* level authentic voice which ought to control the process of implementing the referendum result, with minimal regard to other voices (e.g. societal or territorial minorities). This amounts to those advocating that Brexit must happen as per the referendum vote 'papering over normal pluralities and presenting themselves as articulating the true, real or unitary popular voice' (Freeden, 2017: 8). It also points to a vision where popular democracy triumphs over representative democracy, importing a degree of populism, delivered through the plebiscitary process, into a political system hitherto marked by a strong framework for representative democracy (Weale 2017). Thus Albert Weale (2017) has argued, from the standpoint of UK citizens, that there are no democratic arguments to mandate that those who would argue that a UK exit from the EU risks causing severe damage to the UK ought to refrain from continuing to argue against Brexit. Indeed he goes so far as to argue that there is a *duty* to oppose Brexit imposed on those who view Brexit as likely to cause harm. In line with his vision of representative democracy operating in a pluralist context, Weale rejects the populist claim to speak on behalf of 'the people' as a singularity (Müller, 2016).

³ The requirement to adopt legislation to consent to the withdrawal notification, because of the limitations of crown prerogative and the needs of parliamentary sovereignty, was made clear by the judgment of the Supreme Court in the *Miller* case: [2017] UKSC 5.

⁴ 'EU vote: Where the cabinet and other MPs stand', *BBC Website*, 22 June 2016, <http://www.bbc.co.uk/news/uk-politics-eu-referendum-35616946>.

⁵ For details of the progress of the Bill up to Royal Assent on 16 March 2017, see <http://services.parliament.uk/bills/2016-17/europeanunionnotificationofwithdrawal.html>.

⁶ 'Tony Blair calls for people to 'rise up' against Brexit', *BBC Website*, 17 February 2017, <http://www.bbc.co.uk/news/uk-politics-38996179>; 'Sir John Major attacks 'unreal' Brexit vision', *BBC Website*, 28 February 2017, <http://www.bbc.co.uk/news/uk-39109408>.

⁷ 'Nicola Sturgeon: UK faces Brexit 'lost decade'', *BBC Website*, 14 September 2016, <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-37358584>.

A different sort of challenge to this monocular vision of popular will emerges from an analysis of the various and potentially discordant democratic interests at play in a complex polity such as the UK, which comprises multiple interrelated *demoi* at the subnational, national and the supranational levels, with each level involving elements of both representative and direct democracy. Characterising the UK as a complex democracy comprising plural and often competing political interests (some of which are defined territorially) reflects substantial constitutional change in the UK over the last fifty years. The UK joined the EU in 1973 and, in so doing, knowingly pooled a degree of sovereignty with the other Member States via the EU's supranational institutions. Furthermore, the internal workings of the UK have profoundly changed constitutionally since that time. What matters most for the purposes of this article is the introduction of devolution in the late 1990s; new parliaments or assemblies mean new functional *demoi*, to whom elected officials are accountable, as well as new forms of territorial politics. For both of these reasons (i.e. the shifting of powers *upwards* as well as *downwards*) – and indeed many other reasons, not least the rising trend of using referendums to decide important constitutional questions – the notion of a UK bound together by a single constitutional norm of (Westminster) parliamentary sovereignty can no longer hold sway.⁸ There remains a tension, though, between what Paul Daly calls the 'old constitution' and the 'new constitution' (Daly 2017), and the implications of this transition continue to be worked out, sometimes in the courts, as happened in the case of Brexit with the successful challenge to the use of Crown prerogative as the basis for triggering Article 50 in the *Miller* case.⁹

A singular vision of democracy also misses the point that *demoi* can be horizontally as well as vertically intertwined. In the EU context, decisions taken in one Member State clearly can have spillover effects for citizens and residents of other Member States (Maduro 1998); decisions taken in one part of the UK will have impacts elsewhere.

There are thus several possible democratic deficiencies within the UK referendum process that go beyond the UK citizen/voter focus of Weale's argument. There is one crucial statement contained in the 2017 UK White Paper: it argues that one of the UK's strengths is 'our identity as one nation'. This seems to suggest that both the territorially differentiated outcome of the referendum and the continuing spillover of this decision for the EU27 Member States (and their citizens) come to nought when faced by this singular identity.¹⁰ The simplicity of this declaration sweeps away more than 40 years of constitutional history and crucial legal and institutional changes that have occurred at several levels and across a number of dimensions, in particular in relation to the conceptions of democracy and citizenship, and behaves as if the attachments (both legal and identitarian) that these changes have brought about can be reversed by means of some simple steps (Letsas 2017). It seems to suggest that the UK's territorial constitution is paper

⁸ Aside from devolution, reference could also be made to the Human Rights Act 1998 and the Constitutional Reform Act 2010 in an elaboration of a 'new' UK constitution.

⁹ See above n.3.

¹⁰ HM Government, *The United Kingdom's exit from and new partnership with the European Union*, Cm9417, February 2017.

only. This article argues that this point is true neither as a matter (democratic) theory nor as a matter of (legal and institutional) practice.

3. Demoi-cracy as descriptive tool and normative vision

James Bohman (2007: 2) describes democracy as

...that set of institutions by which individuals are empowered to form and change the terms of their common life together, including democracy itself. In this sense, democracy is reflexive and consists of procedures by which its rules and practices are made subject to the deliberation of citizens themselves. Democracy is thus an ideal of self-determination, in that the terms and boundaries of democracy are made by citizens themselves and not by others.

This suggests that democracy experiences a 'boundary problem', in much the same way as does citizenship. Who are the 'citizens' who set the rules, and how does this group of persons relate to persons excluded from setting the rules, who may none the less be affected by them? The power of 'citizens' to set the rules determining who are the 'citizens' is thus apparently circular, and it seems reasonable to argue that there may be principles restricting the power and discretion of citizens both to set the boundaries of citizenship and to fix the primary agenda for political debate. The debate is not confined to theory. In some aspects of the democratic process, e.g. in local elections, there are already widespread ruptures of the simple equation between citizens and voters. Many non-citizens are allowed to vote in these elections on the basis of inclusive residence-based franchises. The most extensive example of this applies under EU law as an incident of EU citizenship (Shaw 2007). EU citizens can vote in the state of residence under Article 22 TFEU, in local elections (as well as in European Parliamentary elections). There have been extensive calls – thus far unheeded – within the EU for the right to vote in *national* elections to be extended to resident non-national EU citizens and – to complete the picture – the European Commission has issued a recommendation asking those Member States with no or limited external voting (including the UK) to consider implementing a general principle that citizens resident elsewhere in the EU should be able to vote as non-residents in national elections (Arrighi and Bauböck, 2017).¹¹

But there are other ways in which democracies may overlap, and this is where pluralist thinking about 'demoi-cracy' offers a powerful vehicle for setting out the conditions of legitimacy in complex and composite polities. It offers a useful basis for understanding how democratic legitimacy operates in polities comprising more than a single *demos* both in descriptive terms and as an ideal-type setting a normative standard of non-domination amongst the respective *demoi*. Normatively, when the EU is understood as a demoi-cracy, this means that democratically legitimate outcomes ought to emerge from the interplay of states, states peoples and citizens of the EU, not just from any single authority or constituent power. Democracy, in such a complex polity, with multiple *demoi* and democratic interests, is inherently 'multilevel' and multi-perspectival. There is no

¹¹ Recommendation C/2014/391 final, Communication [COM/2014/33 final](#).

one single process that needs to be completed, in order to allow a legitimate decision to be 'declared' as an outcome. On the contrary, before political and legal decisions can be regarded as fully legitimate there will be multiple counterbalancing and often competing interests and arguments that need to be taken into account.

It is precisely the reflexivity of democracy and the plural *demos* existing within complex and composite polities that has inspired much work on the concept of *demos*-cracy in the EU context (e.g. Nicolaïdis 2013a, 2013b, Cheneval and Schimmelfennig 2013; Cheneval et al 2015). Scholars working in this register seek to avoid replicating at the EU level the clarion calls about the pathologies of democracy at the national level, of which there are many, in an era of declining trust in politicians. Doing so would certainly lead to the conclusion that, despite all the reforms over the years, the framework for decision-making in the EU is still lacking when it comes to classic state-based measures of democratic legitimacy. But it is unhelpful if the EU is simply reconceived as a national democracy, writ large. The real challenge is different, and more indeed complex, as Kalypso Nicolaïdis argues:

Threats to democracy in the EU lie in the insularity of its Member States' governments and their refusal to face pervading democratic externalities. They lie with citizens who fail to engage across borders. And they lie in Brussels' (partial) inability legitimately to address these democratic flaws while respecting democratic boundaries (Nicolaïdis 2013a: 351).

In similar vein, Nicolaïdis and Youngs (2014: 1403) highlight Europe's democratic 'trilemma' – 'reform options need to combine three features: *transnational* democratic interdependence; *national* democratic legitimacy; and *local* democratic vibrancy.'

Scholars have pointed out that in a *demos*-cracy it is incumbent upon Member States to avoid, wherever possible, the externalities that result from their own policy choices. Equally, in adopting measures at the EU level, the institutions should adopt a 'do no harm' principle, avoiding damage to the domestic democratic spheres of the Member States (Chalmers 2013). Such principles ought to have an intuitive appeal to the media and publics in the Member States, as they appear to be responsive to local conditions (Beetz 2015). However, as Achim Hurrelmann (2015) has warned us, thus far there is little empirical evidence that citizens themselves can live up to the 'demands' that stem from participating in a *demos*-cratic polity. To put it another way, even the best designed schemes may fail because of citizens' neglect or resistance, not to mention the capacity of Eurosceptic political forces and even the national governments to portray the EU institutions as bureaucratic unresponsive monoliths in which there is no democratic participation or transparency of decision-making at all. Indeed the rise of populist and Eurosceptic political thinking and political parties in Europe emphasises that there may exist a tension between what might be characterised as the 'mobiles' and the 'immobiles' (Bauböck, 2017) within the framework of EU citizenship. These groups may share a 'common' European citizenship, provided they have the nationality of one of the Member States, but in many respects they

constitute two separate political communities across the EU and its Member States, each worthy of equal respect and consideration. Accordingly, in the UK, voters responded with a majority 'Leave' vote after a referendum campaign marked by simplistic slogans such as 'Take Back Control' and little analysis of the risks that such a vote might pose to the situation of around 3+ million UK-resident EU citizens from other Member States beyond vague blandishments by leaders of the Leave campaign that nothing would change if voters opted for Brexit (Glencross 2016). As we shall see, what is less obvious is how these competing interests can effectively be reconciled, if they are all, in some way, of equal concern.

Reflection on why 52% of those eligible and voting opted for the UK to leave the European Union in the vote on 23 June 2016 has focused on differences in educational attainment and attitudes to immigration and the presence of immigrants within communities (Scott *et al* 2017). Leave voters tended to have lower educational attainment and often to reside in places which had experienced sharp rises in immigration especially since the 2004 enlargement of the EU, and often perceived their difficulties in accessing public services on a local basis to be the result of this influx. Arguments about the overall fiscal benefits of immigration to the United Kingdom, and the 'give and take' of EU citizenship, where they themselves (or their families and friends) could be the actual or potential beneficiaries of mobility, cut little ice with these groups of voters. The rhetoric of EU citizenship as 'destined to be the fundamental status of nationals of the Member States'¹² had no traction. On the contrary, EU citizens were constructed as a group external to the UK body politic: 'lucky' immigrants, benefiting from, for example, more favourable family reunification rules than UK citizens themselves. Nothing signalled this exclusion more clearly than the construction of the franchise for the EU referendum, and the manner in which the status of EU citizens (and indeed of UK/EU citizens resident in other Member States) was framed into the referendum debate before and afterwards. This will be one of the focuses of Section 4.

The second focus of Section 4 will be the territorially differentiated outcome of the referendum vote. As a description, 'demoi-cracy' can be productively applied within the UK as well as across the EU. The UK is a 'Union state', and now has a range of devolution and power-sharing arrangements in relation to Scotland, Northern Ireland and Wales. The UK also has other territories such as Crown Dependencies and Overseas Territories, notably Gibraltar, all with internal self-governing arrangements but affected in different ways by the Brexit vote. All of these arrangements are overlaid on classic Westminster parliamentary sovereignty, suggesting that the UK constitutional set-up may be in transition towards a more pluralist future with greater territorial differentiation (McHarg 2018).

It is, however, less obvious that 'demoi-cracy' is a useful normative standard against which to assess democratic practices *within* as opposed to *across* states. After all, Scotland, Northern Ireland and Wales do not enjoy the type of constitutional autonomy which the UK can claim as a state within the European

¹² Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458.

Union, including recourse to Article 50 TEU as the basis for a withdrawal process which need not be consensual (EU law ceases to apply after 2 years in the absence of any contrary agreement). Only Northern Ireland enjoys something like a secession 'right', in accordance with the provisions of the Good Friday Agreement and the Northern Ireland Act 1997, which provides that the future of Northern Ireland is to be determined by the people of Northern Ireland. With respect to the situation in Northern Ireland, Harvey (2016) emphasises that the Brexit referendum delivered a 'complicated message to the Westminster Parliament and Executive'. Scotland operates under a different constitutional set-up, dependent upon the granting of a so-called Section 30 order (as happened before for the 2014 Independence Referendum) before its Government could hold a second independence referendum (Tierney, 2016). Yet the political legitimacy of the Scottish National Party's claim that such a referendum *ought* to be held, in the light of its previous manifesto commitments on the circumstances in which it would argue for a referendum to be held (not to mention the outcome of the 2017 General Election), is at least arguable (if not accepted by all political actors). Again, as at the EU level, it is often hard to see how the competing interests can effectively be reconciled whilst ensuring that no interest dominates another.

In what follows, I will look in more detail at how adjustments to the franchise for referendums as well as the use of 'locks' to ensure effective and representative majorities in referendum votes (i.e. a departure from the use of a unitary 50%+1 approach to obtaining 'majority' consent to the question posed across the whole of the electoral territory) could assist in navigating a pathway through the complex relationship between the ideals of democracy and the realities of political membership in the EU and the UK. That is, are there pragmatic legal and policy responses which could ensure that democracy is not some distant ideal, but rather becomes an embedded part of the practices of the UK? What follows takes into account not merely the multi-level democratic character of the UK, nested within the EU (which has its own arrangements to ensure democratic input into supranational decision-making (Council, Parliament)), and with devolved democratic governments of its own, but also the multi-level character of citizenship in this system. What difference can EU citizenship make – if any – in a situation such as this? And what difference might 'citizenship' of one of the UK's devolved regions, such as Scotland, make?

4. Rights and practices of political membership in the EU and the UK

UK citizens are – by operation of EU law (Articles 9 TEU and 20 TFEU) – EU citizens, with EU citizenship additional to national citizenship. But of course not all UK residents are UK citizens, since many are citizens of other EU Member States or third countries, and not all UK citizens are resident in the UK. In those areas of the UK where devolved powers, including – in Scotland and Wales – legislative powers, are held at the regional level, significant facets of people's lives and thus their social citizenship, including healthcare and education, are regulated at that level. In Scotland, the determination of the franchise is now devolved, so far as concerns Scottish Parliament and local elections.¹³ As we shall see below, the franchise in the UK is fractured across lines determined by devolved, national and EU law, and

¹³ Section 3(3) of the Scotland Act 2016.

driven primarily by a historical constitutional bricolage in which the legacy of Empire is rather significant, as well as spillovers from newer constitutional interventions such as Scottish devolution.

The first referendum on the UK's EU membership was held in 1975 by the Labour Government, no referendum having been held when the UK had originally joined in 1973.¹⁴ By a majority of 67% to 33%, the UK voted to remain in the 'common market', with only the Orkney and Shetland Islands opting for leave. Under the Referendum Act 1975, the franchise on which the referendum was held was based on the Westminster parliamentary franchise, permitting resident UK, Irish and Commonwealth citizens to vote, plus members of the House of Lords who are not normally permitted to vote in Westminster elections. External voting in the UK was not introduced until the 1980s, and so was not applicable. Gibraltar was not consulted.

The franchise for the referendum on UK membership of the European Union was fixed in the EU Referendum Act 2015. This provided that the franchise would be based on the general election franchise, with provision made also for members of the House of Lords to vote, along with electors in Gibraltar who now vote in European Parliament elections pursuant to the *Matthews* case.¹⁵ One of the most contentious issues concerned the extent to which non-resident UK citizens should be enfranchised (Hanretty 2015; Peers 2015). The decision to apply the 15-year external voting restriction applicable to parliamentary elections to the referendum franchise might be thought contestable, as the abolition of that rule was included in the 2015 general election manifesto of the Conservative Party and was the subject of a promised 'Votes for Life' Bill which did not, however, gain parliamentary time before the announcement of the 2017 General Election.¹⁶ Questions were also raised regarding the exclusion of resident EU citizens, not least because they had voted in the 2014 Scottish independence referendum, but also because of the obvious implications of the referendum for their status and rights. The third issue raised was that of enfranchising 16 and 17 year-olds, who not only voted in the Scottish referendum but who have also, since 2016, voted in Scottish Parliament elections and local elections in Scotland.

Although all of these restrictions were contested during the parliamentary process,¹⁷ no amendments to the franchise set in the government bill were made. A number of aggrieved external voters litigated the 15-year external voting restriction using, *inter alia*, an argument based on the impact of such a rule on the free movement of persons under EU law.¹⁸ As with an earlier case concerned with the 15-year restriction in parliamentary elections,¹⁹ the courts in *Shindler and*

¹⁴ UK's membership relied upon a combination of executive action in relation to the negotiation and ratification of treaties, plus parliamentary action (European Communities Act 1972) to give effect to UK membership of the EEC within domestic law.

¹⁵ *Matthews v. United Kingdom*, App No. 24833/94, ECHR 1999-I.

¹⁶ For details see N. Johnston and I White, 'Overseas Voters' (23 March 2017) House of Commons Library Briefing Paper No. 5923.

¹⁷ For details of the passage of the bill see <http://services.parliament.uk/bills/2015-16/europeanunionreferendum.html>.

¹⁸ *Shindler and MacLennan* [2016] EWCA Civ 469.

¹⁹ *R (Preston) v. Wandsworth London Borough Council* [2013] QB 687.

MacLennan concluded that such a rule could not have any foreseeable impact on individual incentives to exercise (or not) free movement rights. Moreover, in *Shindler and MacLennan* the Court of Appeal offered an additional sovereignty-based argument, which it derived from the logic of Article 50 TEU. In this part of its judgment, it referenced as persuasive authority the German Federal Constitutional Court's judgment on the Lisbon Treaty, which emphasised sovereignty in relation to the conditions of Article 50.²⁰ The reference in Article 50 to national constitutional requirements as an element of the withdrawal process suggested to the Court of Appeal that it would be illogical if these requirements (as opposed to the EU-specific procedural elements contained in Article 50) could fall within the scope of EU law and thus ultimately be justiciable before the Court of Justice. On the contrary, they were a matter for the exercise of national sovereign powers. On that argument, the question whether such a franchise restriction might be a disincentive to free movement would not even arise. This sovereignty-based conclusion throws the argument back onto the domestic constitutional conditions, if any, concerning the right to vote, subject to the restrictions contained in Article 1 of Protocol 3 of the ECHR. The latter does not, however, substantially restrict external voting conditions.²¹

In the view of some EU lawyers, the exclusion of EU citizens from the referendum franchise could also have been contested using arguments based on EU law, characterising it as a disincentive to exercising free movement rights (e.g. Kochenov 2009). However, no formal legal claim was brought before the courts, and if one had been it would doubtless have been disposed of in the same terms as the claim brought in *Shindler and MacLennan* on behalf of external voters. EU citizenship, it would seem, is of no assistance in such a matter.

In terms of characterising this group as 'members' of the polity, it might be argued that as non-citizen residents they would have less of an *a priori* claim to participate in the referendum than non-resident citizens. In the world of electoral rights, 'citizenship' more often trumps restrictions than does 'residence'. But the contrast can be drawn with the 2014 Scottish independence referendum when EU citizens were included, but all non-resident citizens were excluded. This was because the franchise was modelled directly on the Scottish Parliament franchise, which includes EU citizens as a matter of UK (now Scottish) law (as an upgrade from EU law), and excludes all non-residents, including those resident elsewhere in the UK (Shaw 2017). Furthermore, certain non-citizen residents were in fact included in the EU referendum franchise, specifically Irish and Commonwealth citizens (including Maltese and Cypriot citizens who are also EU citizens), because this is what *general* UK electoral law provides. At the very least, therefore, the different franchises used in UK referendums resemble bizarre bricolages based on the legacy of empire, neighbourly relations with different countries, the gold-plating of external legal obligations and reading across the different choices made in relation

²⁰ Judgment No 2 BvE 2/08, 30 June 2009.

²¹ Germany provides a good example of sovereignty based restrictions on external voting: see BVerfG, 2 BvC 1/11 from July 4 2012, http://www.bverfg.de/entscheidungen/cs20120704_2bvc000111.html; meanwhile the ECHR position under Article 1 of Protocol 3 is well summarised in *Sitaropoulos* <http://hudoc.echr.coe.int/eng?i=001-109579>.

to elections at various levels within the state. In terms of the choices made for the EU referendum, it would seem that some of the groups most likely to be strongly affected by the decision – long-term external citizens, many of whom rely on EU citizenship rights to reside in the host state, non-UK EU citizens resident in the UK and younger people – were precisely those deprived of a voice.

What has happened in relation to non-UK EU citizens well illustrates the point. During the referendum campaign, this group watched the spectacle of debate being dominated by the slogan ‘take back control’, and since the referendum they have heard the Prime Minister assert that control over immigration was definitely one of the factors which influenced the majority Leave vote and that free movement is a red-line for the UK government in its Article 50 negotiations. This seems to be as much an expression of identity as it is of (unproven) socio-economic arguments that somehow immigrants or immigration are a problem in the UK.

Since the referendum in which, unless they were Irish, Cypriot or Maltese citizens, they could not vote, EU citizens have faced substantial uncertainty and, in some quarters, hostility and worse. As evidenced in particular by the House of Lords EU Select Committee Report on this matter,²² there has been an increase in the numbers of xenophobic attacks, verbal and even physical; a total lack of clarity as to what their status will be once the UK leaves the EU (under any combination of UK law, bilateral agreement between the UK and the EU, and international human rights law, which would intervene to guarantee certain types of residence and family rights); and no certainty as to whether it would be an advantage, at this stage, if they were already to pursue their rights under EU and UK law in advance of the date of exit from the EU or whether instead they should be waiting to see whether the UK government either issues a unilateral guarantee to (some? all?) resident EU citizens or reaches an agreement on ‘free movers’ (in both directions) as part of the withdrawal process. Unsurprisingly, there was widespread anger amongst the EU citizen community that their uncertain status has been consistently characterised by the new post-referendum UK government as a ‘bargaining chip’, or ‘card’ in negotiations with other Member States (Ziegler 2017). In one of his first detailed interventions on the matter, the EU’s chief negotiator highlighted the importance of settling the status of EU citizens in the UK (and UK citizens in other Member States) as a preliminary step in the Article 50 negotiations (Barnier 2017). He emphasised that this needed to be determined in accordance with EU law, not merely on the basis of national law.

One step that those with more than five years residence can take is to seek a determination of permanent residence under Directive 2004/38 and the relevant UK implementing regulations, not least because this is an essential prelude to embarking on the expensive process of applying for UK citizenship. However, trying to take advantage of EU law at present is rendered more complex because of the way that the UK has chosen to apply EU free movement law, even in advance of Brexit, as well as the political shadow of hostility to immigration that has developed in the UK in recent years, which has also engendered hostility to EU ‘free movers’ (Shaw 2015). Increasingly, the characterisation of EU citizens in the

²² See House of Lords Select Committee on the EU, *Brexit: acquired rights*, 10th Report of Session 2016-2017, HL Paper 82.

UK has been as 'lucky' immigrants who have no claim to receive treatment that is different to that given to third country national immigrants or – in certain respects – better than UK citizens themselves (e.g. family reunion). In this atmosphere, the reciprocal nature of free movement and the equality component of EU citizenship are completely lost. Furthermore, until we know the content of the legislation set to be unveiled to give effect to EU law within the UK after Brexit (the ill-named 'Great Repeal Bill'), it is not clear at all whether having a status guaranteed under EU law will have any effect whatsoever in UK law once EU law ceases to apply. Many of the same uncertainties apply, of course, to UK citizens resident in other Member States under EU law.

In terms of the design of political community, the second important point to note is that no locks, checks or balances were placed on the outcome of the referendum. The outcome could have been determined by a simple 50%+1 vote across the entire voting territory. In other words, despite some discussions to this effect in and outside Parliament, the referendum legislation did not include any or all of the following types of 'locks': a requirement that the separate 'nations' of the UK (for these purposes, England, Scotland, Wales and Northern Ireland) must all vote in favour of Leave for this to take effect; a requirement of a minimum percentage for Leave (either of the voting population, or of the overall registered electorate); a requirement for a second vote on the outcome of any Leave negotiations, in the event of Leave being the preferred option in the initial referendum. This has the appeal of treating all electors equally. But given the differentiated outcomes of the referendum, both territorially but also across the age range of voters with older people much more likely to vote Leave than young people (Scott *et al* 2017) the impact of not recognising these distinct democratic interests has had a clear impact on post-referendum politics.

For example, it has contributed to resuscitating the claim for Scottish independence, which had suffered a major blow with the result of 2014 Scottish referendum. In 2016, Scotland voted by 62% to 38% in favour of the UK remaining in the EU. This outcome was a strong expression of opinion in favour of UK EU membership, but it did not contribute to 'tipping' the overall result from No to Yes against the will of England, a result that some had suggested would be an example of the 'West Lothian Question' on steroids (Shaw 2017).

At first blush, the scale of this Remain vote seems to suggest that it might be a simple matter, in a second Scottish independence referendum, for those campaigning for independence to convert the 2014 result of 44.7% Yes (to independence) against 55.3% No into a majority for independence were a second referendum to be held as requested by a majority of the Scottish Parliament in March 2017.²³ It might be thought all the more likely to happen given the approach taken by the UK government to the suggestions made by the Scottish government, e.g. in relation to differentiation *vis-à-vis* the rest of the UK and the conclusion drawn in the *Miller* judgment that there are no legally binding rules within the UK's devolution set up that require the UK government to obtain the consent of the

²³ Resolution of the Scottish Parliament calling for a Section 30 order to allow Scottish Parliament to legislate for a Scottish referendum.

Scottish Parliament before starting the withdrawal process or indeed before effecting withdrawal altogether.

However, identities and allegiances to different unions and polities across time and space are more complex than they first appear. A substantial number of those who voted Yes in 2014 voted Leave in 2016 (Curtice 2017). This is a group of mainly long-term Scottish National Party supporters who demonstrate a cognitive commitment to 'independence' and sovereignty above all else. These are persons who have never accepted the shift made by the party leadership in the 1980s so that the SNP ceased to be a party campaigning for the UK to leave the EEC and became a fervent advocate of the idea of 'Scotland in Europe'. This group cannot be guaranteed still to vote in favour of independence in a referendum if this involves giving a mandate for immediate re-commitment to another Union demanding shared sovereignty. Furthermore, there are substantial numbers of Remain voters positioned to the right of centre whose allegiance to the Union state is more important than their allegiance to the European Union. They will not shift to Yes. But equally, we can reasonably assume that the vast majority of EU citizen residents who were able to vote in the Scottish referendum (although many did not), but not in the EU referendum, would favour independence if it protected their EU citizenship rights, were they to be given the right to vote in a second referendum (as promised already by the Scottish Government). Finally, in any future Scottish referendum we can expect to hear renewed calls for the inclusion on the voter roster of 'external Scots', however this group might be defined (by birth, former residence or attachment) or wherever they might reside.

So while on one side of the equation we can see the evident disjuncture between the UK-wide result (and especially the result in England) and the result in Scotland, highlighting contrasting political choices by two *demoi* (defined by residence in the two parts of the UK), on the other side of the equation there is no simple answer to the question of how the disparate political interests even within Scotland can be finessed into an outcome that can satisfy a majority of the members of the political community (Pattie and Johnston 2017). This is one reason why the Scottish government issued a White Paper arguing that a UK-wide Brexit should contain elements of differentiated treatment for Scotland, e.g. in relation to participation in the single market,²⁴ before it moved to argue for a second independence referendum. It may also presage what some predict will be a future shift in the debate: that independence should lead Scotland towards membership, at least initially, of the less demanding European Free Trade Area and European Economic Area, rather than full EU membership.

In sum, the ideas behind *demoi*-cracy help us to diagnose why these problems of political capacity have arisen in part because of an excessive emphasis on the notion of a single British people expressing its will. However, as we try to disaggregate the *demoi* and assess their competing claims to equal treatment, we see that *demoi*-cracy does not in fact offer any simple solutions for settling these irreconcilable territorial and identitarian interests in the future.

²⁴ Scottish Government, *Scotland's Place in Europe*, 20 December 2016.

6. Conclusions

This article has necessarily been quite synoptic in its approach; at the time of writing uncertainty about the Brexit process was rife in all matters, not just in relation to the challenge of protecting the acquired rights of EU citizens or facilitating an effective response to Scotland's 'difference'.

At the heart of Weale's democracy-based contestation of Brexit was the argument that the referendum itself was not a rupture (Weale 2017). Debate and deliberation must continue, for example, on the terms of Brexit as they will apply to the UK, its citizens, its residents and its component nations and regions (Eleftheriadis 2017). Those who argue that Brexit will cause harm must be allowed to express that view, just as those who have positions of responsibility in relation to its pursuit must be permitted to pursue what they believe to be in the best interests of the UK (Renison 2017). This fits well the model of *demosi-cracy*.

I have sought to show in this article how reconceiving the complex set-ups of both the EU and the UK in *demosi-cratic* terms highlights the challenges of reconciling the interests of different communities defined by citizenship and territorial differentiation. There are difficult questions to be asked about both the pre- and the post-referendum processes when we consider the differential impacts of Brexit upon various groups of citizens and non-citizens, within, without and across the UK and its various constitutionally defined territories. That is not to say that holding a referendum under the terms of UK law was somehow illegitimate or undemocratic (cf. Rostbøll and Olsen 2017). On the contrary, exit rights can be defended on grounds of legitimacy (Francis 2017). But the questions asked in this article do shine a different light upon the referendum debate and legal framing. The standard taxonomies of EU law do not provide clear answers. But nor does the UK's current constitutional framework, given the incoherence of a system based partly on notions of devolution and territorial autonomy and partly on notions of (central) parliamentary sovereignty. It was the absence of any simple answers that motivated the critical enquiry into the normative potential of *demosi-cracy*, in an endeavour to see how best to ensure the autonomy and equality of these interrelated publics. There is no constitutional principle of UK law that prohibits the UK from removing the status, and protection, of EU citizenship from both UK citizens (wherever) and those who are currently resident in the UK as EU citizens but who become third country nationals in the UK on Brexit day. EU citizenship is not an Arendtian 'right to have rights' that somehow transcends the limitations of a treaty concluded between sovereign state actors. But one way forward is to argue that *demosi-cracy* triggers a number of duties incumbent on political actors, as they take the referendum vote forward, in order to guard against the illegitimate domination of one *demos* by others (Bellamy 2013). These are different – and additional too – the duties of Member States to each other, as argued by Lord (2017).

First there is the duty to pay particular attention to the interests of those co-participants in the UK body-politic (EU citizens resident under EU law; UK citizens resident elsewhere under EU law; young citizens) whose voices were not heard in the referendum vote, and whose voices are also attenuated in the associated debates. One might have argued that only the 'softest' of Brexits, conserving as

much as possible of the UK's previous relationships with the EU and its Member States, could be an effective rejoinder to this particular challenge, but it has been clear at least since the date of Prime Minister May's Lancaster House speech that this particular boat had sailed, with the UK Government determined to seek a rather sharper exit from the EU, with red lines being drawn, *inter alia*, around the issue of free movement of persons and the role of the European Court of Justice. But at the time of writing there was still a great deal of work to be undertaken around the securing the acquired rights of EU citizens resident in the UK, and considering the issues affecting UK citizens resident elsewhere, which could respond effectively to a more nuanced and less singular understanding of the referendum as an expression of popular will. One step that urgently needs to be taken concerns the increasingly 'hostile environment' that is being read across from other areas of immigration administration into the administration of EU law residence rights, which has destroyed much trust between resident EU citizens and the host state. This means reforms to the bureaucratic processes to which EU citizens are subject, and perhaps to the substantive rules. As Matthew Grant (2017) has argued, there remains work to do to make the UK seem attractive (again), for if UK citizenship is to be defined, in rules or ethos, in a manner that seems unattractive it is hardly going to be a desirable endpoint status for those who currently call the UK home.

Finally, we can turn to the duties incumbent on political actors in relation to the differentiated territorial outcomes from the referendum. Leaving aside the complex question of Northern Ireland, which is deserving of separate attention, we can already see how troubled the position of Scotland is in relation to the two unions that it currently bestrides – the European one and the British one. Its situation is beset by the fact that in relation to both unions it is only a small player, and thus has limited bargaining power. Its citizens' voice was lost in the larger framework of the whole-UK EU referendum. *Miller* makes clear there are no formal locks on the UK's constitutional future deriving from devolution legislation. But equally, there is still no clear animus in favour of breaking the British union to pursue a 'purely' European future. Even if there were, it is not clear that any second Scottish referendum would be a consensual secession, as would have been the case in 2014 (cf. Closa 2017). In view of all this, there remains much to commend the position taken by the Scottish Government in its White Paper proposing the exploration of admittedly complex and never-before attempted differentiated solutions in relation to 'single market membership' drawing on the experiences of places as diverse as Greenland, the Faroe Islands and Liechtenstein, not to mention the treaty-making power example provided by Flanders. While these proposals had received only a lip service response on the part of the UK Government up to the date of the delivery of the notice of intention to withdraw from the EU under Article 50 TEU on 29 March 2017, they remain apt to provide the basis for at least some negotiations or discussions for the foreseeable future, in ways that reflect equal concern for the varied interests and claims of the multiple *demoi* in and of the United Kingdom.

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